IN THE

Supreme Court of the United States

October Term, 1937.

Nos. [redacted] - 25

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and its Affiliated Companies, etc.,

Petitioners,

against

NATIONAL LABOR RELATIONS BOARD,

and

UNITED ELECTRICAL AND RADIO WORKERS OF AMERICA, affiliated with the COMMITTEE FOR INDUSTRIAL ORGANIZATION.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, et al.,

Petitioners,

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BRIEF FOR UNITED ELECTRICAL AND RADIO WORKERS OF AMERICA IN OPPOSITION TO PETITIONS FOR CERTIORARI.

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Statement.

These are petitions filed by the Consolidated Edison Company of New York, Inc. and certain other companies,

employers, and certain alleged labor unions, for a writ of certiorari to the United States Court of Appeals for the Second Circuit, to review a decision of the said Court of Appeals sustaining an order of the National Labor Relations Board made on the complaint of United Electrical and Radio Workers of America, the present respondent.

The alleged labor unions were not parties to the original proceeding, and the order of the National Labor Relations Board, sustained by the decision of the Circuit Court of Appeals, does not run against them. The record shows that these alleged labor unions were aware of the hearings conducted by the National Labor Relations Board, but did not seek to intervene in those hearings. They did, however, petition the Circuit Court of Appeals for permission to intervene while the matter was pending in that Court, and permission was granted them on the ground that they were parties aggrieved or affected by the order.

The Questions Raised on this Application.

The questions sought to be raised in this Court are stated by the Employers' petition to be seven. They are stated on pages 10-11 of these petitioners' petition and brief. The so-called labor union petitioners list six questions on pages 9-10 of their petition and brief. Some of these questions are clearly not within the rules governing applications for writs of certiorari, and in any event are of no particular importance. The important questions are the same in both lists, and may be stated briefly to be: first, whether the National Labor Relations Board had *jurisdiction* in the premises; and, second, whether it had *power* to enjoin the Employers from carrying out the provisions of an alleged contract between the Employer petitioners and the so-called labor union petitioners.

The Facts Found by the National Labor Relations Board and Sustained by the Court of Appeals.

The important facts found by the National Labor Relations Board and sustained by the Circuit Court of Appeals are as follows:

A. Organization and Business of Employers.

"Consolidated Edison Company of New York is both an operating and a holding company; it owns between 90 and 100 per cent. of the voting stock of each of six affiliates, its co-petitioners. The parent corporation and each of its subsidiaries, with one exception, is a public utility company within the meaning of the Public Service Law of New York and is subject to regulation by the state commission. The one exception is Consolidated Telegraph and Electrical Subway Company, which maintains and leases to others of the petitioners space in sub-surface ducts. The petitioners' labor relations are also subject to state regulation under a recent statute (Ch. 443, Laws of 1937), unless jurisdiction of the state labor relations board must yield to that of the National Board. The petitioners are operated as a unitary system. A few figures will indicate the magnitude of the system's business. In 1936 it supplied 97.5 per cent. of all electric energy sold in New York City, and practically 100 per cent. of that sold in Westchester County; it supplied 55.3 per cent. of the total gas sold in New York City and is the only utility supplying gas in Westchester County. It is the only central-station steam utility in New York City. Its employees number more than 40,000 and its total payroll in 1936, including annuities and separation allowances, was nearly $82,000,000. It used almost 5,000,000 tons of coal and more than 114,000,000 gallons of oil in the year 1936. All of the oil and all but an insignificant portion of the coal moved to the petitioners' plants from states other than New York. The out-of-state purchases are made from independent dealers and are delivered by independent carriers. Although the bulk of the petitioners' business, in respect to both the quantity of service and the number of consumers, is supplying electricity and gas for residential and local commercial uses, they

also have numerous consumers who are engaged in interstate or foreign commerce. The most striking illustrations of this class of consumers are the railroads. Thus, electric energy supplied to the New York Central, the New York, New Haven and Hartford, and the Hudson and Manhattan is used for the lighting and operation of their passenger and freight terminals and for the movement of interstate trains; and steam supplied to the Pennsylvania Railroad Company is used to operate switches in its tunnel under the Hudson River". (Opinion of the Circuit Court of Appeals. Record, pp. 1739-1740).

B. The Employers' Unfair Labor Practices.

Prior to the enactment of the National Industrial Recovery Act, the Employers pursued what is euphemistically called an "open shop policy"—which meant in practice that it did not tolerate any organization among its employees. When the National Industrial Recovery Act was enacted, and it became impossible to prevent employees from organizing, the Employers resorted to what then became a common device on the part of labor-union hating employers,—namely, the organization of so-called Employee Representation Plans, commonly known as "company unions." While these organizations were in existence, the Employers pretended that they were *bona fide* labor organizations, but their character as company unions is *now* undisputed,—as will be seen from the history of the organization of the alleged labor-union petitioners herein, given further below. The manner of the organization of these Plans is described with some detail in the Findings of the National Labor Relations Board and are printed at pages 85-88 of the present record. The National Labor Relations Board also found that these Plans, when organized, were practically functionless and *never engaged in any collective bargaining with the Employers.* The National Labor Relations Board further found that while these Plans were in existence, and up to April 12, 1937, when this Court declared the National Labor Relations Act constitutional, the Employers did not tolerate any genuine labor organization of its employees (Record, pp. 88-90). In order

to prevent such organization, the Employers resorted to the employment of spies for the purpose of discovering any attempts of their workers at organization, and of discharging those of their workers who were doing any organization work among the employees. These practices are described with some detail in the Findings of the National Labor Relations Board. (Record, pp. 103-125).

C. The Character of the Alleged Labor Union Petitioners.

The decisions of this Court in the *Jones & Laughlin* and accompanying cases, on April 12, 1937, made it impossible for the Employers to continue the so-called Employee Representation Plans. But they apparently considered it possible to continue to frustrate the purposes of the National Labor Relations Act. Speedy action was necessary, not only because the Employers could not continue to pay the expenses of the Employee Representation Plans, as they had been doing, without a flagrant violation of the law, but also because the United Electrical and Radio Workers of America, the present respondent, was engaged in an active organization campaign among the employees of the Consolidated Edison System. In these circumstances, the Employers hatched up a scheme whereby the concededly company unions were to be transformed over-night into bona fide labor unions. Fortunately for the Employers, Mr. D. W. Tracy, president of the International Brotherhood of Electrical Workers, was willing to assist in this scheme, for reasons shown in the record but which need not be gone into here. That the scheme was intended to frustrate self-organization by the workers involved, was expressly found by the National Labor Relations Board, and the finding is now sustained by the Circuit Court of Appeals. The manner in which the concededly company unions were transformed into alleged locals of the I. B. E. W. is described with some detail in the Findings of the National Labor Relations Board (Record, pp. 91-99). The Findings of the Board on this subject conclude with the following statement:

> "The evidence reveals the delineations of the respondents' design to dictate to their employees the

choice of their bargaining representative. The first step was to favor the I. B. E. W. by according it recognition at a time when its membership was negligible and its organization hardly commenced and when the respondents knew that the United was the only active labor organization among its employees. The next step was to deliver over the Plan organizations to the I. B. E. W. by making the respondents' position in the matter clear to the Plan representatives. Then followed the organizational drive in behalf of the I. B. E. W. by department heads, foremen, and Plan representatives, leading up to the stage of organization contemplated by Carlisle and Tracy as sufficient to justify the execution of contracts." (Record, p. 99.)

The detailed facts found by the National Labor Relations Board,—and even more so, the evidence adduced at the hearing as spread in the record,—prove, however, more than is stated by the Board in this concluding paragraph. *These facts conclusively prove not only that the Employers coerced their workers into joining the I. B. E. W., but that these alleged locals of the I. B. E. W. (being all of the labor union petitioners, except the I. B. E. W. as such, which has no interest other than that of its alleged locals) are locals of the I. B. E. W. only in name and are actually the same old company unions.*

D. The Alleged Contract Between Employers and the Socalled I. B. E. W. Locals.

Having succeeded in attaching new labels to the old company unions, the Employers proceeded to make "contracts" with these alleged unions, *all of whose officers were the same as those of the old company unions, who were concededly there by the grace of the Employers.*

In this connection, it should be noted that these contracts have never been submitted for ratification to the workers, nor have the officers who executed them ever been authorized to do so by the workers, or ever elected by the workers for the purpose of executing contracts on their behalf.

Nor was this a matter of accident: On the contrary, *it was part of the arrangement that the officers of the old company unions should continue as officers of the alleged I. B. E. W. locals and as such execute these contracts.* The contracts,—there are seven of them,—are dated variously, the earliest being dated May 28, 1937, and the latest June 15, 1937. But the record shows that these written instruments were merely a writing out *in extenso* of an agreement arrived at as early as *April 20, 1937,—before any of these alleged I. B. E. W. locals had been created and before any of the Employers' employees joined the I. B. E. W.*

The circumstances under which these contracts were executed are stated with some detail in the Findings of the National Labor Relations Board (Record, pp. 99-102). The decision of the National Labor Relations Board also contains the following "conclusions" on this subject:

> "We conclude that after April 12, 1937, the respondents deliberately embarked upon an unlawful course of conduct, as described above, which enabled them to impose the I. B. E. W. upon their employees as their bargaining representative and at the same time discourage and weaken the United, which they opposed. From the outset the respondents contemplated the execution of contracts with the I. B. E. W. locals which would consummate and perpetuate their plainly illegal course of conduct in interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed to them under Section 7 of the Act. It is clear that the granting of the contracts to the I. B. E. W. by the respondents was a part of the respondents' unlawful course of conduct and as such constituted an interference with the rights of their employees to self-organization. The contracts were executed under such circumstances that they are invalid, notwithstanding that they are in express terms applicable only to members of the I. B. E. W. locals. If the contracts are susceptible of the construction placed upon them by the respondents (i. e., petitioners herein), namely, that they were exclusive collective bargaining agreements, then, *a fortiori*, they are invalid." (Record, pp. 102-103.)

POINT I.

The basic problem of jurisdiction has been disposed of in the *Jones & Laughlin* case. This case, therefore, does not present any novel question of law.

The argument on the question of jurisdiction is based on the claim that the Employers are not *themselves* engaged in interstate commerce, because they do not *sell or transport* anything in interstate commerce. It is conceded that they *purchase* immense quantities of materials in interstate commerce. We respectfully submit that the basic problem of jurisdiction has been disposed of in the *Jones & Laughlin* case.

National Labor Relations Board v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1.

Leaving entirely out of consideration the *purchase* of immense quantities of materials in interstate commerce, and limiting ourselves only to the activities of the Employers,—that is to say, to the character of the *services* in which they are engaged,—there is no new question of law presented by the case at bar, for it is settled by the *Jones & Laughlin* case that the *Employers themselves* need not be engaged in interstate commerce in order to bring them within the purview of the National Labor Relations Act. Under the doctrine of that case, the question is not whether the Employers themselves are *engaged in interstate commerce*, but whether their activities are such as to *affect* interstate commerce in such a manner that the cessation of these activities would injuriously affect or *burden* interstate commerce.

The question in this case is, therefore, not one of discovering the law of the subject, but rather its application to the facts of the case. This, we respectfully submit, does not bring the case within the rules laid down by this Court for the granting of writs of certiorari. If every application of known rules of law to a new set of facts were to be a ground for the granting of a writ of certiorari, the rules

governing the granting of writs of certiorari would have to be considerably broader than those now in force, as applied by this Court heretofore. But even if these rules were to be given the broadest construction, there would be no reason for the granting of certiorari in this case, *because there can be no doubt that the facts disclosed in this case bring the case within the purview of the National Labor Relations Act.* Without entering into a lengthy discussion of the subject, it is sufficient to point to the condensed statement of facts quoted by us above from the opinion of the Court of Appeals, and to the following passage from the same opinion, in order to remove all doubt on the subject:

> "It is,—said the Court below,—the use which some of their customers make of the electric energy and steam purchased from the petitioners, that furnishes the Board its main ground for claiming jurisdiction. The petitioners argue that they should not be chargeable for the independent acts of customers whom, by state law, they are compelled to serve. But the problem is not to be approached from the standpoint of vicarious liability. It is to be approached as a question of fact, namely, what will be the result upon commerce of a labor dispute between the petitioners and their employees. Should such a dispute result in interrupting the petitioners' service, the effects upon commerce would be catastrophic. We mention only some of them. Instantly, the terminals and trains of three great interstate railroads would cease to operate; interstate communication by telegraph, telephone and radio would stop; lights maintained as aids to navigation would go out, and the business of interstate ferries and of foreign steamships, whose docks are lighted and operated by electric energy, would be greatly impeded. Such effects we cannot regard as indirect and remote." (Record, p. 1741.)

POINT II.

The power of the National Labor Relations Board to order an employer to desist from the enforcement of an alleged contract which is the result of as well as the means of continuing an unfair labor practice is beyond question.

We respectfully submit that the existence of the alleged contract between the Employers and the so-called labor unions, does not raise any novel question of law. The powers of the National Labor Relations Board are ample to protect the workers coming within the purview of the National Labor Relations Act against any device which may be resorted to by Employers in an attempt to circumvent the provisions of that Act. The National Labor Relations Act is a remedial statute, and should be liberally construed. The evils sought to be remedied by that statute are in the same category as those sought to be remedied by the statutes against frauds and monopolies. There is, therefore, no set formula within which the aggrieved party must bring himself in order to be entitled to the protection of the Board or the Courts. Nor is there any form or mode of action which the statute cannot reach. As the Courts have repeatedly said in the cases of frauds and monopolies, the Courts look to substance and not to form. The question, therefore, never is what form the action complained of assumed, but *what was its substance and effect. In the present case, the National Labor Relations Board found, on ample evidence, and the finding was sustained by the Circuit Court of Appeals, that both the organization of the so-called I. B. E. W. locals, as well as the making of the "contract" in question was a means devised and used by the Employers to deprive their employees of the rights guaranteed to them by the National Labor Relations Act.*

That, we respectfully submit, disposes of the question. Not only does the National Labor Relations Act itself provide that such a finding is conclusive upon the Courts, but this Court could not, under well-known rules established by itself, review such a finding, so sustained.

That the form of *relief* granted is within the power of the National Labor Relations Board has been conclusively established by the decision of this Court on February 28, 1938, in the case of

National Labor Relations Board v. *Pennsylvania Greyhound Lines*, 302 U. S. —, 82 L. Ed. 524.

In that case this Court, speaking through Mr. Justice Stone, said:

> "Before enactment of the National Labor Relations Act this Court had recognized that the maintenance of a 'company union,' dominated by the employer, may be a ready and effective means of obstructing self-organization of employees and their choice of their own representatives for the purpose of collective bargaining. Section 2 (3) of the Railway Labor Act of (May 20) 1926 (44 Stat. at L. 577, chap. 347, 45 U. S. C. A., §152), had provided that representatives, for the purposes of the Act, should be designated by employer and employees 'without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other.' We had held that in enforcing this provision, employer recognition of a company union might be enjoined and the union 'disestablished,' as an appropriate means of preventing interference with the rights secured to employees by the statute. Texas & N. O. R. Co. v. Brotherhood of R. & S. S. Clerks, 281 U. S. 548, 560, 74 L. ed. 1034, 1041, 50 S. Ct. 427; see also Virginian R. Co. v. System Federation R. E. D., 300 U. S. 515, 542 et seq., 81 L. ed. 789, 796, 57 S. Ct. 592.
>
> "Congress, in enacting the National Labor Relations Act, had in mind the experience in the administration of the Railway Labor Act, and declared that the former was 'an amplification and further clarification of the principles' of the latter. Report of the House Committee on Labor, H. R. 1147, 74th Cong., 1st Sess., p. 3. It had before it the Railway & S. S. Clerks Case which had emphasized the importance of union recognition in securing collective bargaining, Report of the Senate Committee on Education and Labor, S. Rep. 573, 74th Cong., 1st Sess., p. 17, and there were then available data showing that once an employer has conferred recognition on a particular

> organization it has a marked advantage over any other in securing the adherence of employees, and hence in preventing the recognition of any other."
>
> *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 302 U. S. — , 82 L. Ed. 524, 527, 528.

The argument that the International Brotherhood of Electrical Workers is not a "company union," and that there is no specific finding that the "locals" in question are company unions is clearly of no avail. The International Brotherhood of Electrical Workers, as such, clearly has no interest in the case aside from its so-called locals. And its "locals" are clearly company unions within the meaning of the decision of this Court in the *Greyhound* Case. In this connection, it must be borne in mind that the Act itself does not use the expression "company union." This was done advisedly. For it was not the purpose of Congress in enacting this great piece of remedial legislation, to prevent the organization of company unions, but leave the workers exposed to the evils which this legislation was designed to remedy if the Employer should be fortunate enough to find some old established union that was willing to lend itself to the designs of the Employers. On the contrary, the whole tenor of the National Labor Relations Act, as well as its specific provisions, clearly show that the evil sought to be remedied was the interference of Employers with the free choice of representatives by their employees, and that *the condition sought to be established was that of absolute freedom of choice on the part of workers not only between "company unions" and real labor unions, but also as between competing labor unions.* The order of the Board would, therefore, be correct even if the so-called I. B. E. W. locals had been old existing and admittedly bona fide labor unions. *A fortiori* is this the case, when the facts show that these so-called I. B. E. W. locals are nothing but "company unions" in a new disguise. The National Labor Relations Board did not so label these organizations, because there was no necessity to do so. The law is not concerned with labels but with actions and practices. And the National

Labor Relations Board found that the creation of these so-called I. B. E. W. locals was the result of the unfair practices of the Employers. *This gives these organizations their character both as a matter of fact and as a matter of law.*

Nor does the existence of the alleged contracts make any difference. *Fraud* vitiates all contracts. So does *monopoly. So does an unfair labor practice.* Otherwise the whole law could be nullified by the Employer coercing his employees to submit to a contract. The National Labor Relations Board specifically found that the contract in question was illegal. Such a finding is not, however, at all necessary in order to sustain the order of the Board. The National Labor Relations Board is not concerned with the abstract questions of legality of a contract, even though it may have to make a finding of illegality in the course of its exercise of the functions conferred upon it by law. The question in this case is, therefore, not whether the contracts are illegal in the sense that they may not confer some rights upon somebody. The question is rather whether the Board, having found that these contracts were entered into as part of a scheme to deprive the workers of the rights guaranteed to them by the National Labor Relations Act, and through unfair practices condemned by that Act, may proceed to order the Employer to desist from enforcing them. The power of the Board to do so is now beyond dispute. And the necessity for so doing has been found by the National Labor Relations Board as a matter of fact. Indeed, it could not very well be otherwise. What this Court said in the *Greyhound* Case as to the effect of *recognition,* clearly applies with greater force to the "contracts" in question. Indeed, "recognition" could not be withdrawn from the I. B. E. W. so long as the "contracts" are being enforced. No greater weapon could have been designed to destroy the right of free and untrammelled collective bargaining by workers through representatives of their own choice than a "bargain" concluded in violation of the Act, if the Board were powerless to deprive that "bargain" of its efficacy. The Board, therefore, rightfully concluded that:

> "In order to establish conditions for the exercise of an unfettered choice of representatives by the respond-

ents' employees, the respondents will be ordered to cease and desist from giving effect to the contracts with the I. B. E. W. locals, from recognizing the I. B. E. W. as the exclusive bargaining representative of their employees, and from their other unlawful conduct; and to post notices that they will so cease and desist, that their employees are free to join any labor organization, and that the respondents will bargain collectively with any labor organization entitled thereto." (Record, p. 103.)

CONCLUSION.

The petition for a writ of certiorari should be denied.

Dated, New York, April 18, 1938.

Respectfully submitted,

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